OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-29

# THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER)

Michael T. Skinner, Adjudicator
July 17, 2003

Quicklaw Cite: [2003] B.C.I.P.C.D. No. 29
Document URL: http://www.oipc.bc.ca/orders/Order03-29.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

**Summary**: Applicant, a teacher employed by the public body, requested copies of letters about applicant written by parents. Public body correctly released the substance of third parties' letters to the applicant but properly refused under s. 22 to disclose their identifying information. However, the public body failed to respond in the time permitted by the Act.

**Key Words:** personal information – supplied in confidence – relevant to fair determination of rights – public scrutiny – public health and safety – unreasonable invasion of personal privacy.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 7, 8, 10, 22(1), 22(2)(a), (b), (c) and (f).

**Authorities Considered: B.C.:** Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-30, [2001] B.C.I.P.C.D. No. 31; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

## 1.0 INTRODUCTION

[1] The applicant, a retired teacher formerly employed with The Board of School Trustees of School District No. 44 (North Vancouver) ("the public body"), requested "letters (of a negative nature), which have been written about me, or in reference to me, and sent to my employer or my employer's representative, a school principal, in June 2001." The applicant submitted her request was submitted verbally by the applicant on or about "the last week of June" 2001, but did not submit it in written form as required by s. 5(1) of the *Freedom of Information and Protection of Privacy Act* ("Act") until July 25, 2001. The School District ultimately provided the records sought to the applicant December 3, 2001, after considerable communication between the applicant and public

body. The applicant claims that the public body failed to comply with the Act by not giving her notice of an extension of response time, in failing to obtain an extension of time under s. 10 of the Act and in general, by failing to provide the records in time. The applicant also claims generally that the public body failed to assist her, contrary to s. 6 of the Act.

[2] The records sought by the applicant consist of letters written to the school at which the applicant taught by parents of students attending the school. The applicant believes that the letters were written as part of an organized campaign of harassment and defamation and wished to obtain the records to, in her words, "… continue the investigation into the lack of intervention [by the school or school district] in the slander. The outcome of this investigation I hope will be that those who have the power and duty to stop slander will do so."

[3] The public body responded by releasing edited copies of the records to the applicant. Any information about the applicant was treated as her personal information and released to her; any information about the writer of the letter or a student referred to in the letter was treated as third-party personal information and severed under s. 22 of the Act. The applicant asserts that it was improper to withhold the names and addresses of the authors of the letters.

[4] On January 31, 2002, the applicant requested that this Office review the public body's actions under the Act. This matter did not settle in mediation. On September 24, 2002, after an agreed extension of the inquiry deadline, the applicant requested that this matter go to inquiry. The parties to this inquiry are the applicant (former teacher), the public body and the third parties (parents or guardians of students at a school within the district) whose personal information is at issue. The applicant also submitted a number of procedural objections in the course of the inquiry process, which I address below.

[5] As the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, I have dealt with this inquiry by making all findings of fact and law and any necessary order under s. 58 of the Act. This office provided the third party notice of this inquiry under s. 54(b) of the Act and the third party made submissions.

## 2.0 ISSUES

[6] The issues before me in this inquiry are as follows:

1. Did the public body fulfill its duty under s. 6 of the Act to assist the applicant?

2. Did the public body meet its statutory duties under ss. 7, 8 and 10 of the Act with respect to compliance with timelines, extensions and notice of extension?

3. Is the public body required by s. 22(1) to withhold personal information of the third parties?

[7] Previous orders have placed the burden of proof on the public body to establish that it has complied with its ss. 6(1), 7 and 10 duties. Under s. 57(2) of the Act, if the portion of the record to which the applicant is refused access contains personal information about a third party, the applicant must prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

## 3.0 DISCUSSION

[8] **3.1 Procedural Issues** – The first objection in this inquiry concerned the applicant's objection to the disclosure of her personal information – apart from her name – to the third parties in the inquiry process. That concern was addressed through the simple expedient of having the public body remove the applicant's personal information from its initial submission.

[9] The applicant also objected to this Office's practice of allowing no replies to replies (also known as a "sur-reply"). At the time she filed the objection, she had not seen the public body's reply and was evidently nervous at the prospect of not being allowed to respond in the event of the public body raising new issues or evidence in its reply submission. As the public body's reply submission did not raise new evidence or issues, the applicant's concern was misplaced.

[10] The applicant objects to the third parties having "special and unique treatment with all the advantages of double representation and unexamined testimony." The applicant refers to the fact that up until December 2002, the third parties participated in the inquiry process indirectly, by providing evidence that was intended to be submitted by the public body. This Office made a decision in December, 2002 to give the third parties notice under s. 54(b) as "appropriate persons" to participate in the inquiry.

[11] The applicant argues that being able to make a submission and have the public body make a submission in support of the same result amounts to "double representation". Not so. This Office chose to invite participation by "appropriate" persons under s. 54(b) of the Act. In this there is no unfairness. Evidence of the third parties was naturally tendered *in camera* – a practice to which the applicant objects – since to disclose it would reveal the information in dispute in this matter. I find that the evidence before me *in camera* is properly submitted.

[12] The applicant's last "procedural objection" was not so much an objection as a plea to this Office to prevent the public body from disclosing the applicant's personal information by way of its inquiry submission that would be copied to the third parties. This Office was careful to ensure that such an event did not occur.

[13] **3.2 Duty to Assist and Other Duties** – The applicant has raised the issue of the public body's compliance with s. 6(1), but has also pleaded more specific alleged failures to observe the requirements of the Act. I consider that the appropriate focus is on the specific allegations and I will deal with those.

[14] The applicant says the public body failed to meet the timelines set out ss. 7 and 10 of the Act. The public body admits this, but argues that a combination of the summer school vacation, the demands of school administration in September and consultations with both legal counsel and the third parties meant it could not hope to meet the 30 day timeline set out in s. 7 of the Act. That may be so, but the Act incorporates provisions to provide for flexibility in such circumstances. Under s. 10(2), the public body may take an additional 30 days to respond, of its own volition, but must tell the applicant that it has taken such an extension, the reason for it, when a response can be expected and that the applicant may complain about the extension to this Office.

[15] Failure to do these things constitutes a departure from the standards expected of a public body. However, given that the Act provides no other sanction for such conduct, I can do no more than find that the public body did not discharge its statutory duties. These requirements exist for the benefit of individuals such as the applicant, who are forced to operate in the dark, so to speak, if there is no meaningful and timely communication concerning the progress of their request for records.

[16] **3.3 Third-Party Personal Privacy** – My review of the records at issue in this inquiry confirms that the public body disclosed all of the applicant's own personal information to her. The public body also applied s. 22 of the Act and declined to disclose personal information of the third parties. The relevant portions of s. 22 follow below:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence, …

[17] In Order 01-53, [2001] B.C.I.P.C.D. No. 56, Commissioner Loukidelis affirmed the approach for the application of s. 22, which I follow in this case (paras. 22, 23, and 24).

[18] In this case, I find that the public body has correctly followed the first step of the process – it has identified the respective personal information of the applicant and of the third parties and, with the consent of the third parties, has released to the applicant the information that can rightly be characterized as hers. The public body then proceeded to determine whether disclosure of the other personal information, which it found to be the third parties' information, would be an unreasonable invasion of the third parties' personal privacy. The public body did not find any element of the information to fall under s. 22(4) – such information would have to be disclosed – nor did it, evidently, find any circumstance listed in s. 22(3) to be applicable. Nor can I find any portion of s. 22(3) or (4) which might apply. The public body must then, regardless of the applicability of any part of s. 22(3), consider the relevant circumstances set out in s. 22(2), which it did. A consideration of those relevant circumstances follows below.

***Supplied in confidence***

[19] The heart of the submissions by the public body and the third parties in this inquiry is that the communications from the third parties to the school were supplied in confidence (s. 22(2)(f)) and should remain confidential. Both the public body and the applicant refer to the indicators articulated in Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44, in support of their contentions that the personal information of the third parties was (public body's view) or was not (applicant's view) supplied in confidence. The relevant portion of Order No. 331-1999 (from p. 8) follows below:

> Section 16(1)(b) requires public bodies to look at the intentions of both parties, in all the circumstances, in order to determine if the information was "received in confidence".
>
> What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors – which are not necessarily exhaustive – will be relevant in s. 16(1)(b) cases:
>
> What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
>
> 1. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
>
> 2. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
>
> 3. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply

> that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
>
> 4. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
>
> 5. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
>
> 6. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?

[20] Although the Information and Privacy Commissioner articulated the above criteria of confidentiality in the context of s. 16, which addresses the matter of disclosures potentially harmful to intergovernmental relations, the criteria may nonetheless be usefully applied to s. 22(2)(f), albeit with a measure of caution, as not every criterion may be appropriate to a particular fact situation. The public body's conclusion is that the criteria are met in this case; the applicant in turn argues, point by point, that they are not met.

[21] The applicant argues (at p. 20 of her initial submission) that the actions of the public body after the supply of information (see point 6 in the Order No. 331-1999 criteria above) did not provide any objective evidence of an expectation or concern for confidentiality: "The principal revealed the contents of the letters to me. The names of the students and parents, along with their statements that they didn't want their children in my class, were discussed by the teachers deciding on the placement of the children." The fact that the contents and identities of the authors may have been discussed does not necessarily destroy a claim of confidentiality under the Act, as was pointed out in Order 01-30, [2001] B.C.I.P.C.D. No. 31 (at p. 5):

> [17] It does not, in my view, follow from the fact that the letter was read aloud to the applicant and others that the personal information it contains was not "supplied in confidence" within the meaning of s. 22(2)(f) of the Act. To the contrary, the evidence suggests that the personal information was supplied in confidence, but that the quality of confidentiality was later diminished, if not lost. I accept that the personal information contained in the letter was "supplied in confidence" to UBC within the meaning of s. 22(2)(f). This does not, of course, mean that the personal information must be withheld from the applicant. It is merely one relevant circumstance that, in this case, favours withholding the personal information from the applicant.
>
> [18] I should say here that the personal privacy interests of third parties are not defeated simply because the letter was read aloud to the applicant. Depending on the circumstances, a previous disclosure of personal information, whether verbal or written, does not necessarily mean that later disclosure of the same personal information, in response to an access request, will not unreasonably invade personal privacy. It all depends on the circumstances. The earlier disclosure will be

> a relevant circumstance to consider, under s. 22(2), in deciding whether the personal information can be disclosed in response to the later access request.

[22] The applicant says that she already knows the identities of the third parties, as well as of another individual whom the applicant regards as the instigator of an alleged campaign of harassment and defamation. Whether or not she has through her employment learned the identities of the third parties may be a relevant circumstance in determining whether the third parties' personal information should be disclosed, but in the circumstances of this inquiry is not of sufficient weight to overcome the evidence that the letters were intended to be held and received in confidence. It might be a factor of greater weight if the information had been previously disclosed to the public, which is not the case here. In a similar manner, the notion that the names and contact information of the third parties may have appeared on class lists prepared by the public body is, in my view, of no merit in determining the application of s. 22 in these circumstances.

[23] In this case, I apply the Commissioner's reasoning above and find that the sharing of otherwise confidential information for necessary employment-related purposes does not diminish the application of s. 22(2)(f) as a relevant circumstance in determining whether disclosure of the third parties' personal information would be an unreasonable invasion of their personal privacy.

[24] In this case I find no indicator to rebut the evidence that the third parties intended that their communications with the school were confidential. On the contrary, the six third parties wrote supplementary submissions to the public body confirming that they "expected their identity and personal information to be kept by [the school principal] in confidence" (affidavit of Phil Turin sworn October 21, 2002, para. 31). Thus I find s. 22(2)(f) to be a relevant consideration in determining whether the severed information was properly removed from the records in the form in which they were ultimately disclosed to the applicant.

***Public scrutiny***

[25] The applicant argues that s. 22(2)(a) is a relevant circumstance: namely, that "disclosure is necessary for subjecting the activities of … a public body to public scrutiny." The applicant's contention is that the public body failed to intervene to stop the slander to which the applicant says she was being subjected. In this case, the applicant is concerned with the conduct of private individuals. Disclosure of the third parties' personal information would not have the effect of subjecting the activities of the public body to public scrutiny.

[26] Thus, I find s. 22(2)(a) not to be a relevant circumstance in determining whether disclosure of the requested information would constitute an unreasonable invasion of the third parties' personal privacy.

***Public health and safety***

[27] The applicant argues that s. 22(2)(b) is a relevant circumstance, namely that: "the disclosure is likely to promote public health and safety…" In support of this contention, the applicant argues that "one of the adverse effects that slander has on a victim is the negative impact on their health." I do not see how s. 22(2)(b) is relevant to this case: the section refers to public health and safety, not private health or safety. Further, I cannot see how disclosure of the third parties' personal information would, or could, promote public health or safety. Section 22(2)(b) is not relevant in this case.

***Fair determination of applicant's rights***

[28] The applicant also argues that s. 22(2)(c) is a relevant circumstance: "the personal information is relevant to a fair determination of the applicant's rights." The applicant submitted an *in camera* affidavit of an individual who alleges organized harassment and defamation of the applicant's character and capacity as a teacher. I am not at liberty to describe the *in camera* contents any further than that. The applicant has sought the letters in dispute in this inquiry as part of what she describes as a "chain of evidence" in responding to what she perceives as an organized campaign to harass and discredit her (and the *in camera* affidavit just described supports that contention). I would note simply that this is not in my view adequate to satisfy the application of s. 22(2)(c) as a relevant circumstance, given the criteria set out in Order 01-07, [2001] B.C.I.P.C.D. No. 7 (paras. 30, 31 and 32).

[29] The applicant has provided no evidence to this inquiry that a legal proceeding – in court or otherwise – is either under way or contemplated. Thus I find that the applicant has not satisfied the above criteria in which, as noted, all separate elements must be found to apply.

[30] Based on my review of the circumstances relevant to this case, I conclude that the public body is required under s. 21(1) of the Act to refuse to give the applicant access to the withheld information

[31] **3.4 Disclosure in the Public Interest** – The applicant also asserts the application of s. 25 (the so-called public interest override) but previous orders establish that s. 25 requires a compelling, urgent need for public disclosure that is clearly in the public interest. Section 25 is manifestly inapplicable to this case. I find that the dominant interest in the applicant's request is of a private rather than public nature and is not "clearly in the public interest."

## 4.0 CONCLUSION

[32] For the reasons given above, under s. 58 of the Act, I require the public body to refuse to give the applicant access to the information that it withheld under s. 22(1) of the Act.

July 17, 2003

**ORIGINAL SIGNED BY**

Michael T. Skinner
Adjudicator